CHUA KEOK SENG v. WEE ENG YONG.

[O. C. J. (Brown, J.) April 1, 1954]

[Singapore — Suit No. 466 of 1953]

Negligence — Contributory negligence.

This was an action for damages for negligence. The plaintiff was shot by the defendant who was one of a party of three men shooting flying foxes. The plaintiff had been asked to accompany the party because he knew of a suitable place. The plaintiff was shot at a distance of 15 to 20 feet and suffered serious injuries. At the moment when the shot was fired no flying foxes were overhead and none were within shooting range. The defendant called no evidence but it was submitted on his behalf that the plaintiff was guilty of contributory negligence on the ground inter alia that he was a voluntary member of the shooting party.

Held: the plaintiff was not guilty of contributory negligence merely by the fact of his voluntarily joining the shooting party.

Case referred to:—

(1) *Stanley v. Powell* (1891) 1 Q.B. 86.

ACTION FOR DAMAGES.

F. B. de Souza for the plaintiff.

R. S. Boswell for the defendant.

Cur. Adv. Vult.

Brown, J.: — At about 11 p.m. on the night of the 13th of November 1952 the plaintiff was shot by the defendant who was one of a party of three men shooting flying foxes. The plaintiff had been asked to accompany the party because he knew of a suitable place. The plaintiff was shot at a distance of 15 to 20 feet, and suffered serious injuries. The defendant called no evidence. But, on behalf of the defendant, Mr. Boswell submitted that the plaintiff was guilty of contributory negligence because "(1) he was a voluntary member of the shooting party; (2) when he knew that the shooters were on the point of taking up their shooting positions he should have taken the precaution of getting out of the firing-line." With regard to the first part of that submission, in fairness to Mr. Boswell I should perhaps say that a similar argument appears to have been advanced in the well-known case of *Stanley v. Powell*[1], though it has not, I think, been advanced since. It seems to me that it might as well be argued that a person who voluntarily takes a ride in a motor-car is guilty of contributory negligence if he is subsequently injured by the negligent driving of the driver. A gun, if used with proper care, is no more dangerous than a motor-car; a motor-car, if used negligently, can be no less dangerous than a gun. In regard to the second part of Mr. Boswell's submission, his idea of the "firing-line" is the line "through which the gun was raised in order to aim at the flying foxes overhead." I should have thought that, in the case of a careful shooter, the line of fire was the line from the barrel of the gun, when placed in the aiming position, to the target. I may add that at the moment when the shot was fired no flying foxes were overhead, or none within shooting range.

[The remainder of the judgment deals with the question of damages. The learned Judge awarded $5,173.50 by way of special damages and $9,800 for general damages, making a total of $14,973.50. — Ed. M.L.J.]

Order accordingly.

Solicitors for the plaintiff: *Battenberg & Talma.*

Solicitors for the defendant: *R. C. H. Lim & Co.*

KESARMAL & ANOR. v. VALLIAPPA CHETTIAR.

[Privy Council (Lord Tucker, Lord Keith of Avonholm and Mr. L. M. D. de Silva) February 2, 1954]

[Privy Council Appeal — No. 26 of 1952]

Duress — Occupation Period — Transfer of land — Transferee's knowledge of duress to be established — Titles to Land (Occupation Period) Ordinance, 1949, s. 27(1) & (5) — Land Code (Cap. 138), ss. 2 & 42 — Fresh evidence — Under what circumstances allowed — "Not indefeasible" — Does not mean void.

This was an appeal from the Judgment of the Court of Appeal (Murray-Aynsley, C.J. (Singapore), Abbott and Wilson, JJ., March 21, 1952) affirming the Judgment of Taylor, J. of the Supreme Court of the Federation of Malaya (reported in (1951) M.L.J. 117) in which the learned trial Judge set aside an instrument of transfer of land executed by the respondent on July 20, 1943, in favour of the appellants on the ground that it was obtained by duress within the meaning of section 27 of the Titles to Land (Occupation Period) Ordinance, 1949.

The appellants' application to adduce fresh evidence was refused both by the Court of Appeal and the Privy Council.

The transferee appealed against the decision of the Court of Appeal.

Before their Lordships of the Privy Council there were three questions for consideration, two of fact and one of law, which were decided by the Courts of the Federation of Malaya.

The two questions of fact were:—

1. Was the execution of the instrument of transfer of the 20th July 1943 by the respondent in favour of the appellants procured by duress within the meaning of section 27 of the Titles to Land (Occupation Period) Ordinance 1949?

2. If so, were the appellants at the time they took the transfer aware that its execution had been procured by duress?

The question of law was:—

If the second of the above questions be answered in the negative is the respondent nevertheless entitled to have the instrument set aside if its execution had been obtained by duress?

Held: (1) it is an essential condition that the fresh evidence which a party seeks to adduce was not available at the trial and that reasonable diligence would not have made it available. As there was nothing to prevent or even impede the appellants from producing such evidence at the trial, the application to adduce must fail. There being no other ground upon which the first finding was or could have been attacked the finding must stand; (2) there was ample material from which the inference